REPUBLIC OF KENYA

IN THE ENVRONMENT AND LAND COURT AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO 191 0F 2018

IN THE MATTER OF: AN APPLICATION BY SCORPION PROPERTIES LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION AGAINST THE NAIROBI COUNTY GOVERNOR AND NAIROBI CITY COUNTY

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE LAND REGISTRATION ACT, NO. 3 OF 2012

AND

IN THE MATTER OF: FAIR ADMINSTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

SCORPION PROPERTIES LIMITED.....APPLICANT

AND

NAIROBI COUNTY GOVERNOR (MIKE MBUVI – SONKO)...1ST RESPONDENT

NAIROBI CITY COUNTY.....2ND RESPONDENT

RULING

The applicant's case.

What I have before me is a Chamber Summons application dated 24th October, 2018 brought by Scorpion Properties Limited ("the applicant") seeking the following orders;

1. That the applicant be granted leave to apply for;

   a. An order of CERTIORARI to call into this honourable court for the purposes of being quashed the decision and/or directive by the respondents to convert the applicant's property known as Nairobi/Block 91/56 Gigiri ("the suit property") into a fire station and the illegal encroachment and occupation of the premises.

   b. An order of PROHIBITION prohibiting the respondents by themselves, their agents, employees and/or anybody deriving authority from the respondents from interfering, occupying and/or encroaching in any way on the suit property.

   c. A DECLARATION that the applicant's fundamental right to fair administrative action and right to property was infringed and/or violated by the respondents in the unlawful eviction of the applicant's tenants and temporary and/or intended

occupation of the suit property contrary to the provisions of Articles 27, 40 and 47 of the Constitution of Kenya.

d. A DECLARATION that the respondents are constitutionally obligated to act lawfully, fairly and reasonably in the exercise of their constitutional mandate which principles were violated in the decision and/ or directive that led to the trespass on the applicant's property on 10th August, 2018 by the 1st respondent.

2. That the leave sought if granted to act as a stay of any attempt by the respondents by themselves, their agents, employees and/or anybody deriving authority from the respondents from encroachment by occupation and eviction of the applicant and/or its tenants from the suit property.

3. An order of mandamus to compel the Officer Commanding Police Division (OCPD) – Gigiri to help in enforcing this Honourable court's orders.

4. An order for compensation of the applicant for breach of its constitutional right and economic injury.

5. General damages.

6. The costs of the application.

7. Any such further orders as this Honourable Court shall deem just and fit to grant.

The application was brought on the grounds set out on the statutory statement and verifying affidavit of MADATALI SABURALI CHATUR both dated 24th October, 2018 and a further affidavit dated 19th December, 2019. The applicant has contended that it is the registered owner of all that parcel of land known as Nairobi Block 91/56 Gigiri ("the suit property") and that the respondents purported to make a decision and/or directive converting the suit property into a fire station site. The applicant has averred that pursuant to that decision the respondents unlawfully began to evict the applicant's tenants from the suit property on 10th August, 2018 and threatened to occupy the property. The applicant has averred that the respondents started parking the 2nd respondent's fire trucks on the suit property. It is the aforesaid decision and/or directive by the respondents that the applicant intends to challenge through judicial review. In summary, the applicant intends to seek a review of the respondents' decision/directive aforesaid on the following main grounds;

1. That applicant was not given a hearing before the said decision was made contrary to Article 47 of the Constitution that guarantees every person a right to a fair administrative action.

2. That suit property is private land and the applicant's interest therein which is protected under article 40 of the Constitution cannot be interfered with without reasonable cause.

3. That the respondents had no right to revoke title to land.

4. That the respondents' actions complained of were ultra-vires their powers and amounted to a usurpation of the mandate of the National Land Commission.

5. That the respondents' decision was malicious, irrational, oppressive and capricious.

6. That the respondents' decision curtailed the applicant's rights over the suit property without following the due process.

7. That the suit property was under a threat of being repossessed by a bank due to default in payment of the loan that the applicant had secured using the property as a result of the tenants that had terminated their tenancies.

8. That if the court did not intervene, the applicant stood to suffer irreparable harm since the suit property was in danger of being converted into a fire station.

9. That the 1st respondent had displayed a bravado attitude that was a threat to the rule of law.

10. That it was fair and just that the court grants the orders sought.

In his verifying affidavit filed in support of the application, the applicant's director Madatali Saburali Chatur stated as follows: The applicant was the leasehold proprietor of the suit property from the Government of the Republic of Kenya for a term of 99 years with effect from 1st January, 1989. The applicant had occupied the suit property for over 14 years after purchasing the property for value from the person to whom it had been allocated. The applicant had over the years paid land rates to the 2nd respondent and land rent to the Government for the suit property. The 2nd respondent's County Assembly and the National Land Commission had confirmed that the suit property was owned by the applicant. On 10th August, 2018, the 1st respondent while accompanied by fire trucks purported to evict the applicant from the suit property and to have the said trucks parked on the property. The respondents' intention was to have the 2nd respondent's fire department moved to the suit property together with its equipment and employees. The respondents did not inform the applicant of their intention to convert the suit property into a fire station. The applicant's director produced a video clip of the 1st respondent's invasion of the suit property.

In his further affidavit, the applicant's said director stated that the 1st respondent had evicted several tenants from the suit property and that the few tenants that remained were continuously being harassed. He stated that the respondents had erected three Kiosks on the suit property that were rented out by the 2nd respondent and that the respondents were using the empty space on the suit property that was being used as a car bazaar to park fire trucks as and when they deemed it fit. He stated that the respondents had started executing their unlawful decision to convert the suit property into a fire station.

On 29th October, 2018, the court directed that the applicant's application be served for hearing inter-partes.

The respondents' case.

The applicant's application was opposed by the respondents. The 1st respondent opposed the application through a replying affidavit sworn on 23rd January, 2019. The 1st respondent stated that the suit property was set aside for a fire station and that the leasehold title held by the applicant in respect of the property was fraudulent as the persons from whom the applicant acquired the property were fraudsters. The 1st respondent stated that he had not done anything in his personal capacity to warrant being sued. He contended that the applicant was using the court to frustrate the respondents from delivering services to the public.

The 2nd respondent opposed the application through a replying affidavit sworn by Jasper Ndeke on 24th January, 2019. In the affidavit, the 2nd respondent averred that the ownership of the suit property was in dispute and that the property was mentioned in the Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land ("the Ndungu Report") as one of the parcels of land that had been illegally allocated to private individuals. The 2nd respondent averred that the suit property was originally set aside for a fire station and that whether the suit property was private or public land was pending determination in Nairobi High Court Civil Suit No. 2156 of 2007. The 2nd respondent averred further that their investigations revealed several irregularities from the time the property was allocated up to the time it ended up with the applicant. The 2nd respondent averred that the applicant was aware as early as 2007 that the ownership of the suit property was disputed. The 2nd respondent averred that the applicant borrowed money on the security of the suit property knowing well that the title was in dispute. The 2nd respondent averred that the applicant had not established a prima facie case to warrant the grant of the orders sought. The 2nd respondent averred that the permission that it had granted for the establishment of a car bazaar on the suit property to Bomas Motor Mart was for a renewable period of one year and that there was a prohibition against the construction of permanent structures on the suit property. The 2nd respondent averred that the permission to operate a car bazaar on the suit property was not renewed and was instead revoked by the 2nd respondent through a letter to the applicant dated 15th April, 2009. The 2nd respondent averred that the evidence placed before the court showed that the applicant had put up permanent structures on the suit property contrary to the conditions that the 2nd respondent had given to the applicant while allowing it to operate a car bazaar on the suit property. The 2nd respondent averred that the applicant had not attached a copy of the decision sought to be reviewed through an order of certiorari. The 2nd respondent averred that the applicant was not entitled to the leave sought since it had not shown the procedural lapses its application is based on or the decision being challenged. The 2nd respondent urged the court to dismiss the application with costs.

Determination.

The application was argued by way of written submissions. The applicant filed its submissions on 19th February, 2019 while the 2nd respondent filed its submissions on 13th March, 2019. The 1st respondent did not file submissions even after time was extended for him to do so. I have considered the application, the affidavits filed in response thereto by the respondents and submissions of counsels. Two issues arise for determination in the present application. First, whether the applicant has made out a case for grant of leave to institute judicial review application against the respondents and secondly, whether leave if granted should operate as a stay. The following is my view on the matter.

In Njuguna *v* Minister for Agriculture [2000] 1 E.A 184, it was held that:

> **"the test as to whether leave should be granted to an applicant for judicial review is whether, without examining the matter in any depth, there is an arguable case, that the reliefs might be granted on the hearing of the substantive application.''**

In Republic *v* County Council of Kwale & Another Ex Parte Kondo & 57 Others [1998] 1 KLR (E&L) the court set out the rationale for seeking leave to apply for judicial review as follows:

> **"The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration."**

The court's power to grant leave is discretionary. In the book; Public Law in East Africa published by Law Africa, the author Ssekaana Musa has stated as follows at page 250:

> **"Judicial review is a discretionary jurisdiction. The prerogative remedies, the declaration and the injunction are all discretionary remedies with exception of habeas corpus which issues ex debito justitiae on proper grounds being shown. A court may in its discretion refuse to grant a remedy, even if the applicant can demonstrate that a public authority has acted unlawfully."**

As I have stated earlier in this ruling, the applicant has sought leave to apply for; an order of certiorari to quash the alleged decision by the respondents to convert the suit property into a fire station, an order of prohibition to prohibit the respondents from interfering, occupying and

or encroaching in any way on the suit property, a declaration that the applicant's fundamental right to a fair administrative action and right to property was infringed and /or violated by the respondents and a declaration that the respondents were constitutionally under an obligation to act lawfully, fairly and reasonably in the exercise of their constitutional mandate which they failed to do when they trespassed on the suit property. The applicant has sought other prayers which are not relevant to the application before the court.

I am not satisfied that the applicant to demonstrated that it has a prima facie case against the respondents. In Halsbury's Laws of England, 4th Edition at paragraph 46, the author has stated as follows:

> **"The courts have inherent jurisdiction to review the exercise by public bodies or officers of statutory powers impugning on legally recognized interests. Powers must not be exceeded."**

In the text H. W. Wade and C. F. Forsyth, Administrative Law, 10th Edition, the authors have stated as follows at page 509 on the remedies of Certiorari and Prohibition:

> **"The quashing order and prohibiting order are complementing remedies, based upon common law principles …..A quashing order issues to quash a decision which is ultravires. A prohibiting order issues to forbid some act or decision which will be ultravires. A quashing order looks to the past, a prohibiting order to the future."**

In Kenya National Examination Council *v* Republic, Ex-parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR, the court stated as follows on the scope and efficacy of remedies of Prohibition and Certiorari:

> **"….prohibition is an order from the High Court directed to an inferior tribunal or body which prohibits that tribunal or body to continue proceedings in excess of its jurisdiction or in contravention of the laws of the land…. Only an order of Certiorari can quash a decision already made and an order of Certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons."**

In order to determine whether the applicant has established a prima facie case against the respondents of violation of its public law rights, the first question to ask is whether the applicant has demonstrated that there is in existence a decision that was made by the 1st and 2nd respondents in their capacities as a public officer and a public body respectively capable of being reviewed by the court. The applicant's complaint is that the respondents made a decision to convert the suit property which is private land registered in the name of the applicant into a fire station without giving it an opportunity to be heard and in violation of its right to property guaranteed under the Constitution. There is no evidence of whatsoever nature placed before the court of any such decision. From the material placed before the court, there has been a long standing dispute between the applicant and the 2nd respondent over the ownership of the suit property. Although the suit property is registered in the name of the applicant as the owner thereof, the 2nd respondent has all along contended that the property was reserved for a fire station and as such the same was acquired through a fraudulent process of which the applicant was a beneficiary. The respondents placed before the court an extract of the Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land ("Ndungu Report") in which the suit property is listed among public land that was illegally/irregularly allocated to private developers. The report recommended that the title that was held by one, Robert Otachi who sold the property to the applicant be revoked. In the said report, it is indicated that the suit property was reserved for a fire station in Gigiri. The only evidence that the applicant has placed before the court to show the alleged decision to convert the suit property into a fire station is a video clip titled "**Sonko shakes land cartels as he goes physically to repossess public land in Gigiri**" in which the 1st respondent's visit to the suit property in the company of several fire engine trucks was captured. I have watched the video. There is nothing in the video suggesting that a decision had been made or was being made to convert the suit property into a fire station. What the 1st respondent was captured as saying was that the suit property was reserved for a fire station and that he had gone to the property to evict the illegal occupants who had grabbed the same to make way for fire engine trucks to be parked there. I have seen that the 1st respondent ordered the vehicles that were parked on the property to be removed so that the fire engine trucks could come in. In my view the actions of the 1st respondent captured in the said video clip if unauthorised were acts of trespass whose remedy lied in a civil court for damages and injunction. The 1st respondent's unauthorised entry into the suit property followed by a declaration that he was repossessing the same for a fire station that it was reserved for cannot be termed a decision made by the respondents in exercise of their statutory or constitutional powers in respect of which the applicant should have been given a hearing. In the circumstances, it is my finding that there is no decision oral or otherwise made by the respondents that can be subjected to judicial review. What has been demonstrated by the applicant is an act of trespass that should have been litigated in a civil suit filed for that purpose.

I have also noted from the replying affidavit filed by the respondents that there is a pending civil suit over the ownership of the suit property namely, Nairobi HCCC No. 2156 of 2007 in which both the applicant and the 2nd respondent are parties. It is clear from the contents of the affidavits filed by the parties herein that there is a dispute over the ownership of the suit property. The applicant has claimed that it is the registered owner of the suit property. The respondents have claimed on the other hand that the suit property was reserved for a fire station and that the same was acquired by the applicant unlawfully prompting the purported repossession by the 1st respondent which is the subject of the present application. It is not disputed that the suit property was mentioned in the Ndungu Report as one of the public land that was illegally/irregularly allocated to private entities. As I have mentioned earlier, the report recommended that the title of the property be revoked. This court would not be able to determine in a judicial review application the issue of the ownership of the suit property. In Republic *v* National Land Commission Ex-Parte Ephrahim Muriuki Wilson & others [2018] eKLR) the court stated as follows:

> **"In this regard, it is important to mention that what emerges is that there is a land dispute, and this Court cannot allow itself to be used to resolve a land dispute disguised as a Judicial Review application. Behind the curtain of these Judicial Review proceedings is the real dispute, namely, ownership, use and or occupation of land. These questions call for the need for this Court to exercise caution, care and circumspection. First, there is the question of jurisdiction discussed earlier. Second, there is a real danger of this Court rendering a decision that will have the implication of determining ownership of the disputed land. I decline the invitation to venture into this forbidden territory.**

The upshot is that I dismiss this Judicial Review application with costs to the Interested Parties. I award no costs to the Respondent since it did not participate in the proceedings."

In Republic *v* Cabinet Secretary, Ministry of Interior & Co-ordination of National Government & 2 others Ex-Parte Kisimani Holdings Ltd [2015] eKLR, the court dealing with a similar issue stated as follows:

"26. As was held in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354**:

> **"Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application…...…Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be a need for *viva voce* evidence to be adduced on how the land was acquired and came to be registered in the names of the applicant; whether the title is genuine or not. In cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land namely occupation, and disposition, there would be need to allow *viva voce evidence* and cross-examination of the witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced……..It may indeed be true that the notice that is impugned is irregular or unlawful and an order of *certiorari* would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles…..So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of *certiorari* because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the issue over the ownership of the land still stands and it will require determination by way of filing pleadings and *viva voce evidence* at another forum preferably the Civil Courts**."

> **27. To grant the orders sought herein will leave the serious conflicting issues of fact raised in these proceedings unresolved hence will be a source of future conflicts since as already stated judicial review applications do not deal with the merits of the case but only with the process. In other words, in judicial review applications the Court's jurisdiction is to determine whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts with an intention of securing a determination on the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits."**

I am of the view that since the applicant was aware that there was a dispute over the ownership of the suit property and that the respondents were challenging its title, the applicant should have challenged the respondents' attempted repossession of the suit property in the pending civil suit in which all the issues that have been raised herein could be determined through *viva voce* evidence.

Due to the foregoing, I am not inclined to exercise my discretion in favour of granting the leave sought by the applicant. In the circumstances, it is not necessary for me to consider the issue of stay pending the hearing of the judicial review application. The applicant's Chamber Summons application dated 24th October, 2018 is accordingly dismissed. Each party will bear its own costs.

Delivered and Signed at Nairobi this 19th day of November 2020

S. OKONG'O

JUDGE

Ruling delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Obae h/b for Mr. Omogeni S.C for the Applicant

N/A for the 1st Respondent

N/A for the 2nd Respondent

Ms. C. Nyokabi-Court Assistant